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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE FOR THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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QUESTION PRESENTED

Whether the United States Court of Appeals has jurisdiction pursuant to 5 U.S.C. § 8347, 5 U.S.C. § 7703 and judicial precedent to review decisions of the Office of Personnel Management and the Merit Systems Protection Board regarding disability retirement applications other than those initiated by an employing agency on the basis of an individual's mental condition.

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BRIEF AMICUS CURIAE FOR THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36, written consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO (AFGE) files this brief as amicus curiae in support of Petitioner Wayne Lindahl in this action.

INTEREST OF THE AMICUS CURIAE

The American Federation of Government Employees (AFGE) is a labor organization affiliated with the AFL-CIO. AFGE represents approximately 700,000 civilian employees of the federal government in the United States and overseas. AFGE is the largest labor organization of non-postal federal employees including the so-called blue

collar, white collar and professional groups of employees situated in nearly every major department and agency of the Federal government. In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents grievances, initiates court actions, and carries on legislative activity to enhance the welfare of the employees it represents. AFGE has previously initiated or participated in judicial action involving retirement issues and entitlements of its members.

The United States Court of Appeals for the Federal Circuit in an *en banc* decision in *Lindahl* v. *Office of Personnel Management*, 718 F.2d 391 (Fed. Cir. 1983) held that the disability retirement statute precluded judicial review of a Merit Systems Protection Board (MSPB) decision affirming the denial by the Office of Personnel Management (OPM) of a former federal employee's application for disability retirement.

The Federal Circuit's decision has an impact on hundreds of its members, who will have no access to the Federal Circuit for review of certain disability retirement decisions of OPM and the MSPB in cases pending before these administrative agencies or where future applications will be submitted. Because of the Federal Circuit's restrictive reading of the disability retirement statute there are serious implications for withholding of their jurisdiction in other cases arising under similar statutes.

AFGE is committed to the protection of constitutional and statutory rights of federal employees and to challenging actions which infringe upon these rights. In this regard AFGE has a direct and compelling interest in assuring that the Federal Circuit assert some form of review authority over OPM and MSPB decisions, where such decisions implicate important disability retirement entitlements.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Wayne Lindahl is a former federal employee who was removed from federal service because his severe bronchitis rendered him unable to perform the duties of his position. Pursuant to the terms of the Civil Service Retirement Act, 5 U.S.C. §§ 8331-8348, Petitioner immediately thereafter applied for a disability annuity.

In an application to OPM, the Petitioner, who had contributed to the retirement fund for more than five years, alleged that he had a disease or injury which precluded him from rendering useful and efficient service in the grade or class of position he last occupied. 5 U.S.C. § 8331(6), 5 U.S.C. § 8337. OPM, and the MSPB on review, denied his application for disability retirement. The United States Court of Appeals for the Federal Circuit, in an *en banc* decision, dismissed his petition on jurisdictional grounds, a plurality holding that 5 U.S.C. § 8347(c) precludes judicial review of voluntary disability retirement decisions.

5 U.S.C. §§ 8347(c) and (d) provide as follows:

> (c) The Office [OPM] shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.
>
> (d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.
>
> (2) In the case of any individual found by the Office

> to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

By its holding the Federal Circuit has overruled over twenty years of its own precedents and acted contrary to the majority of the circuits that have addressed this issue.

In addition, the Federal Circuit has chosen to ignore the legislative history specifically recognizing an existing limited form of judicial review, and merely expanding the judicial review in certain types of disability retirement cases initiated by the Agency. Further, the Federal Circuit's decision operates contrary to this Court's pronouncement that absent clear and convincing evidence of Congressional intent to preclude the important right to judicial review, review must be granted.

ARGUMENT

I. There is No Clear and Convincing Evidence that Congress Intended to Preclude All Judicial Review of Disability Retirement Matters

The Federal Circuit asserts that the so-called "finality clause" in 5 U.S.C. § 8347(c) provides "unequivocally and unambiguously that administrative decisions on questions of disability are final and conclusive and are not subject to review." The Federal Circuit concludes "[i]t is difficult to conceive of a more clear-cut statement of congressional intent to preclude review . . ." 718 F.2d at 393.

The history of the disability retirement statutory scheme can be traced briefly as follows. The finality clause language relied on herein to preclude the Federal Circuit jurisdiction first appeared in relation to survivorship benefits in 1948 in 5 U.S.C. § 724 and was extended to include

disability cases in 1956, as codified at 5 U.S.C. § 2266. In 1978, Congress passed an amendment to the retirement statute, 5 U.S.C. § 8347, Pub L. No. 95-454 (Civil Service Retirement Act). That amendment again left intact the finality language with respect to OPM's decisions, (replacing the Civil Service Commission), although providing for access to an administrative review by the newly created MSPB. In 1980, Congress, concerned about potential for abuse and stigma occasioned by agency initiated disability retirement applications based on an individual's alleged mental condition, made additional amendments to the law. Senate Report No. 96-1004, 96th Cong. 2d Sess. (1980). House Report No. 96-1080, 96th Cong., 2d Sess. (1980). These amendments provided modifying language to the finality provision in 5 U.S.C. § 8347(c) by referencing subsection (d) and specified MSPB adherence to procedures under 5 U.S.C. § 7701 and the full scope of judicial review provided under 5 U.S.C. Section 7703 for review of MSPB decisions involving agency initiated disability retirement applications for mental conditions.

After journeying through a similar development of the disability retirement statute, the Federal Circuit concluded that "[u]ntil 1980, Congress had at no time specifically granted jurisdiction to any court to review any question, by either OPM or MSPB, on questions of disability and dependency." Although earlier acknowledging a paucity of legislative history concerning the origins of the finality provisions, the Federal Circuit rejects twenty years of precedence of its predecessor court, the presumption favoring judicial review of agency actions, and the legislative history accompanying the 1980 amendments by reliance on what it calls the "plain language of the statute." Although the finality language now contained in Section 8347(c) has been in existence since 1948, and has been consistently interpreted to provide for narrow judicial review, the Federal Circuit declares a clear statutory preclusion for review. Yet, the finality language of

Section 8347(c) has never been regarded as a complete bar to judicial review of decisions by OPM (or its predecessor Civil Service Commission) or the MSPB.

The Federal Circuit in its plurality opinion rejects the Supreme Court's declared presumption of judicial review over agency actions, finding 5 U.S.C. § 8347(c) to be an express preclusion of judicial review. 718 F.2d at 397.

While the scope of judicial review of administrative action may be specifically limited by statute, there is a presumption that an agency action is reviewable. Judicial review will be precluded only if Congress' intent to preclude such review is clear and convincing. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136(1967); *Barlow* v. *Collins*, 397 U.S. 166(1970); *Dunlop* v. *Bachowski*, 421 U.S. 560(1975); *Johnson* v. *Robison*, 415 U.S. 361(1974). This presumption of reviewability is especially strong where definitive personal rights are created by federal statute, such as retirement benefits, similar in kind to those customarily treated in courts of law. *Stark* v. *Wickard*, 321 U.S. (288(1944).

The language of 5 U.S.C. § 8347(c) does not provide clear and convincing evidence of a Congressional intent to bar all judicial review of disability determinations. *McCard* v. *MSPB*, 702 F.2d 978, 981 (11th Cir. 1983). The statute only evinces a congressional intent to bar judicial review of factual questions concerning disability and dependency. *Parodi* v. *MSPB*, 690 F.2d 731, 735 (9th Cir. 1982); *Turner* v. *OPM*, 707 F.2d 1499, 1502(D.C. Cir. 1983). It is possible to give effect to Congress' obvious intent to foreclose judicial review of the sufficiency of the medical evidence, yet preserve the generally recognized duty of the courts to require a governmental agency to follow the procedural and substantive framework established in the act the agency administers and to prevent the agency from violating constitutional rights. *Pitzak* v. *OPM*, 710 F.2d 1476, 1479 (10th Cir. 1983); *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 567.

In further support of this position that the finality clause of section 8347(c) is compatible with judicial review of MSPB disability decisions that are confined to procedural infirmities and irrational decision making is the juxtaposition of the finality clause with a statement immediately thereafter concerning OPM's determination of the facts. *Turner* v. *OPM*, *supra*, 707 F.2d at 1502. This clearly demonstrates that the finality clause in non-agency initiated disability retirement cases for mental conditions operates with respect to a review of the factual determinations only. While the Federal Circuit herein rejects this suggestion, without explanation, 718 F.2d at 397, such a view renders the finality clause language much more plausible than its interpretation.

The Federal Circuit plurality goes so far as to suggest that even where the OPM and MSPB act so irresponsibly and arbitrarily as to employ unacceptable interpretations of law, statutes or regulations, and totally inadequate procedures for the purpose of denying annuities to those who voluntarily retire, it could not exercise jurisdiction. 718 F.2d at 397. The Federal Circuit in this regard states that the right to retirement or a retirement annunity has no basis in the Constitution. 718 F. 2d at 392. The Court states that "one whose application for an annuity is denied after voluntary disability retirement is not by that denial alone deprived of a constitutional right. There being no liberty or fundamental pre-existing property interest at risk, the simplest procedures adopted by the agency will avoid a claim of denial of procedural due process." 718 F.2d at 397.

The Federal Circuit erroneously concluded that an employee who has met the minimum service and disability requirements does not have a legitimate property interest in entitlement to an annuity. Federal employees have protected property interests in these retirement annuities. *Kizas* v. *Webster*, 707 F.2d 524 (D.C. Cir. 1983); *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548 (D.C. Cir. 1983). After an employee

serves five years of continuous employment and is found to be totally disabled, his/her entitlement to an annuity is a vested property right. The Federal Circuit's failure to acknowledge this property interest and abrogation of a means of enforcing it where there are serious procedural or legal deficiencies implicate constitutional and statutory rights. Action of the executive branch in violation of constitutional or statutory rights of a Petitioner is subject to judicial review. *Leedom* v. *Kyne*, 358 U.S. 184(1958); *American School of Magnetic Hearing* v. *McAnnulty*, 187 U.S. 94(1902); *Harmon* v. *Brucker*, 355 U.S. 579(1958). The concurring opinion of Judge Nichols recognizes the potential danger of extending the preclusion of judicial review "to instances of unconstitutional and void determinations where Congress could not reasonably, in the light of history, have expected the preclusion to be effective." 718 F.2d at 405. Congress cannot deprive the federal courts of jurisdiction to review agency action that is in contravention of the Constitution, a federal statute, or regulation, even where there is a finality clause in the statute. *Schlesinger* v. *Councilmen*, 420 U.S. 738, 749(1975); *Pitzak* v. *OPM*, *supra*.

As will be developed further herein, Congress' continued acknowledgment of a line of cases permitting a narrow scope of review in the routine disability retirement cases, and expansion of that review to agency initiated disability retirements for mental condition, evinces a clear intent not to preclude all judicial review.

II. The Federal Circuit's Rejection of the "Scroggins" Line of Cases is Based Upon Artificial Distinctions Regarding Voluntary or Involuntary Nature of the Disability Retirement Application

In rendering its decision in this matter, the Federal Circuit presumes an unchartered body of judicial precedent in application of the finality clause in the statute. Unremarkable to the Federal Circuit is that the finality language in the disability retirement statute is in essence

identical to the language of the statute as it existed when its predecessor court established a definite, albeit narrow scope of judicial review. *Gaines* v. *United States*, 158 Ct. Cl. 497, *cert. denied*, 371 U.S. 936(1962); *Scroggins* v. *United States*, 397 F.2d 295 (Ct. Cl.), *cert. denied*, 393 U.S. 952(1968); *McGlasson* v. *United States*, 397 F.2d 303 (Ct. Cl. 1968); *McFarland* v. *United States*, 517 F.2d 938 (Ct. Cl. 1975); *cert. denied*, 423 U.S. 1049(1976); *Allen* v. *United States*, 571 F.2d 14 (Ct. Cl. 1978); *Fancher* v. *United States*, 588 F.2d 803 (Ct. Cl. 1978). In what has been designated as the "Scroggins formula," although having its genesis in *Smith* v. *Dulles*, 236 F.2d 739 (D.C. Cir. 1956), the Court of Claims determined that it could set aside the Civil Service Commission's (OPM's predecessor) decision where "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination."

The Federal Circuit discounts each and every one of these consistent Court of Claims decisions, by its assertion that "we face here no settled case law," in its finding that all of these cases dealt with forced retirements for mental conditions or physical disability. The distinction for review based upon the forced or voluntary nature of the disability retirement is not recognized in the body of judicial case law or legislative history. Further, the Federal Circuit's interpretation ignores the reality of this type of separation, and is contrary to their subsequent pronouncement on the identical treatment of these cases. If truly finding that the 1980 Amendment did not alter the previous finality provision, 718 F.2d at 400, the Federal Circuit offers no rational basis for overturning the precedence of the Court of Claims.

The holdings of the United States Court of Claims shall be binding as precedent upon the Federal Circuit, *South Corporation* v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982). By creating a distinction not found in the provision of the statute relied upon by the court herein, 5 U.S.C.

§ 8347(c) (Nichols, concurring opinion, 718 F.2d at 400), nor the legislative history, the Court believes it sidesteps its repudication of the Court of Claims precedent. Yet as Judge Nichols (concurring) opines, the factual basis of the statement that Mr. Lindahl is a voluntary retiree is uncertain. After an employee such as Mr. Lindahl is terminated from employment for disability reasons, it can hardly be posited that his disability retirement application is voluntary. Under these circumstances, Judge Nichols prefers to assume that Mr. Lindahl's retirement was involuntary. 718 F.2d at 400.

More significantly, this Court in a panel comprised of the Chief Judge who issued the majority opinion in the instant case, subsequently determined in *Henderson* v. *Office of Personnel Management*, 724 F.2d 119(Fed. Cir. 1983) that there is no legal reason for application of a different rule from Lindahl, precluding judicial review in involuntary physical disability retirement cases. The Federal Circuit stated that:

> [i]n *Lindahl*, it is correct that the subject claim had been made voluntarily, but the fact was not pivotal, as it could not be. The critical language of 5 U.S.C. § 8347(c) makes no distinction between voluntary and involuntary claims based on physical disability. Thus the principle in *Lindahl* remains applicable. This court does not have jurisdiction to review decisions of the MSPB on physical disability claims which are involuntary.

724 F.2d at 120.

Although using this distinction of voluntary vs involuntary retirement in *Lindahl* to reject an entire body of Court of Claims precedent, the Federal Circuit in *Henderson* completely emasculates that distinction and makes no reference to the *Scroggins* line of cases.

The other federal circuits relying on the *Scroggins* line of reasoning for employee initiated disability applications have made no such distinction or reference to dissimilar treatment based upon voluntary vs involuntary consid-

erations. *Parodi* v. *MSPB*, *supra* (9th Cir. 1982); *Pitzak* v. *OPM*, *supra* (10th Cir. 1983); *Turner* v. *OPM*, *supra* (D.C. Cir. 1983); *McCard* v. *MSPB*, *supra* (11th Cir. 1983).

The *Scroggins* line of cases which has also been uniformly applied by the Court of Claims since the inception of the finality language in the disability retirement statute can not be summarily ignored under this thin and untenable distinction.

III. The Legislative History Surrounding the 1980 Amendment to the Disability Retirement Statute Evinces a Congressional Intent to Maintain the Prevailing Judicial Review in Existence for Over Twenty Years

The Federal Circuit states that it finds no support for the view that the 1980 amendment to the disability retirement statute merely expanded the "breadth" of review in cases beyond the "limited" review said to be available for such cases in *Scroggins*. Again in making this finding the Federal Circuit limits *Scroggins* impact to that of involuntarily disability retirement cases for mental conditions, ignoring its expansion by the Court of Claims and other circuits to involuntarily retirement for physical disability and "voluntary" disability retirement claims. *Polos* v. *United States*, 621 F.2d 385 (Ct. Cl. 1980); *Parodi*, *supra*; *Turner*, *supra*. The Federal Circuit plurality states that by leaving the finality language in 5 U.S.C. § 8347(c), Congress intended what it always provided in its original enactments of no judicial review. 718 F.2d at 399, 400.

It is submitted that the dissenting opinion of the four circuit judges, written by Circuit Judge Davis, is the more reasoned approach. 718 F.2d at 405, 406. According to this analysis, the 1980 amendment of 5 U.S.C. 8347 did not lessen or abolish the narrow judicial review that has been accorded to disability retirement matters at least since 1956. *Scroggins*, *supra*, *McGlasson*, *supra*, *Fancher*, *supra*, *et. al.* The legislative objective, the dissent states, in contrast to the majority, was to expand judicial review in

the special area of involuntary mental disability retirement. This view was shared wholeheartedly by five other circuits considering this matter, *Parodi* v. *MSPB* (9th Cir.) *supra; McCard* v. *United States* (11th Cir.) *supra; Turner* v. *OPM* (D.C. Cir) *supra; Pitzak* v. *OPM* (10th Cir.), *supra;* and *Lancelotti* v. *OPM*, 704 F.2d 91 (3rd Cir. 1983).

The dissent herein summarizes the core of these recent decisions:

> (a) [T]he standard of narrow judicial review [Scroggins formula] had been utilized for many years when Congress considered the 1980 amendment; (b) Congress was made quite aware of that standard during its consideration of the 1980 amendment; (c) the whole focus of that Congressional consideration was the over-narrowness of that standard for involuntary mental disability cases; (d) no one seems to have suggested that, for other types of disability cases, the existing standard should be lessened or all review abolished (indeed the then Director of OPM expressly told Congress that the prior standard would continue for non-member disability cases, see *Turner* v. *OPM*, *supra*, 707 F.2d at 1503-1504); (e) there is nothing in the Committee reports that the prior judicial standard was no longer to be followed in the non-mental area; and (f) no change was made in the wording of the "finality" clause (except for the special provision for mental disability and express authorization for review by the MSPB).

718 F.2d at 406

The decisions in *McCard*, *Turner* and *Parodi* further highlight the legislative history and demonstrate the Federal Circuit plurality's fatal misreading and general disregard of that history. The purpose of the 1980 amendment was to prevent involuntary disability retirement proceedings from being misused to force unpopular employees out of active service for reasons of mental incompetency. H. R. Rep. No. 1080; 96th Cong. 2d Sess. 2-3 (1980). To check this possibility of misuse, Congress expanded the scope of judicial review beyond the *Scroggins* level, for this one class of disability determinations, to

include the traditional "substantial evidence" and broad scope of review under section 7703. S. Rep. No. 1004, 96th Cong. 2d Sess 2, *reprinted* in 1980 U.S. Code Cong. and Ad News 5986, 5987. "Given that the sole purpose of the amendment was to expand judicial protection of employees through review of factual findings in a certain subset of cases, it hardly follows that Congress negatively implied its intent to strip employees of *Scroggins*—type review in other cases." *Turner* v. *OPM*, *supra*, 707 F.2d at 1503. To the contrary, the House Report to the 1980 amendment in discussing the problem Congress intended the amendment to remedy, pointed to three cases that did not allow "judicial review," to show that the amendment was necessary. H. Rep. No. 1080, 96th Cong. 2d Sess 4 (1980). As the court in *Parodi*, *supra*, 690 F.2d at 736, points out, in all three of these cases, *Scroggins*, *McGlasson*, and *McFarland*, the Court of Claims held that under section 8347(c) courts should not review the factual findings that underlie an agency's disability and dependency determinations, but that limited judicial review, i.e. review under the *Scroggins* rule, is appropriate. Thus the *Parodi* court properly concludes, the bar on judicial review referred to by the report precludes only judicial review of factual findings. 690 F.2d at 736.

This view, moreover, was confirmed by the Director of OPM himself, who wrote to Congress at the time of the amendment's consideration, and whose statements were submitted in the record. The statement of the OPM Director provided:

> We believe that it is reasonable and proper to restrict expanded judicial review to involuntary disability retirements. An employee who *voluntarily* applies for disability retirement seeks to establish title to a benefit granted by law; the Office of Personnel Management is the administrative agency charged under the law with the managerial function of adjudicating disability retirement claims. It is appropriate therefore, that OPM decisions on voluntary applications be

> conclusive, reviewable only to determine whether there has been a substantial procedural error, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination.

H. R. Rep. No. 1080, *supra* at 7-9.

The latter standard being a recitation of the *Scroggins* language, it becomes unfathomable how the Federal Circuit concludes that "the legislative history contains no statement of the [Scroggins] formula," 718 F.2d at 399, and that Congress in essense was ignorant of its application. See also virtually identical letter of Director OPM to Senator Ribicoff (Sept. 25, 1980), preceded by a statement of the Committee that OPM endorses its position. S. Rep. No. 1004, 96th Cong. 2d Sess. (1980). Although OPM's position now apparently has changed, far more deference is due the agency's contemporaneous explanation of the statute's effect than is due its present post-hoc litigating position. *Turner* v. *OPM*, *supra*, 707 F.2d at 1504; *Udall* v. *Tallman*, 380 U.S. 1(1965). Indeed, MSPB, the final administrative arbiter of this matter, by its advice to petitioner at the bottom of its Opinion and Order in this case, and its position before the Federal Circuit, flatly contradicts OPM. *Turner*, *supra*, 707 F.2d at 1504. An administrative agency's construction of the statutes which it is charged with administering is due substantial deference. *Udall* v. *Tallman*, *supra*, 380 U.S. at 16; *United States* v. *Rutherford*, 442 U.S. 544, 553. The Federal Circuit without justification failed to accord appropriate deference to the position of the MSPB. *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367, 381(1969); *Power Reactor Development Company* v. *International Union of Elec., Radio, and Machine Workers*, 367 U.S. 396, 408(1961).

The legislative history in the House of Representatives in setting forth OPM's position also specifically states that it is in accord with the committee's stance that it is reasonable and proper to restrict "expanded" judicial

review to involuntary disability retirements. H.R. Rep. No. 96-1080, 96th Cong., 2d Sess. P. 3(1980).

The dissent, written by Circuit Judge Davis, cogently states that in the face of this legislative history:

> it is hard for me to think that, in explicitly expanding review for mental cases, Congress silently withdrew for non-mental cases the limited judicial review that had been allowed. To paraphrase what the Supreme Court said in *Merrill, Lynch, Pierce, Fenner and Smith* v. *Curran*, 456 U.S. 353, 381-2 . . . (1982) (a recent Supreme Court decision holding that the reenactment and enlargement of another statute had incorporated a prior judicial gloss) "it is abundantly clear" that the "Scroggins standard was a part of the 'contemporary legal context' in which Congress legislated in 1980. "In that context the fact that a comprehensive reexamination and significant amendment" of the disability retirement legislation "left intact the statutory provisions under which the federal courts" had developed and used the *Scroggins* standard "is of itself evidence that Congress affirmatively intended to preserve that remedy." When the "finality" language was retained and embodied in the 1980 amendment, the language carried with it the existing judicial interpretation.

718 F.2d at 406.

Indeed, Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation of a statute when it reenacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581, *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 419(1975). Further, the recodification or revision of a Congressional act "indicates approval of court interpretations of the statute made prior to reenactment." *Atkins* v. *United States*, 556 F.2d 1028, 1039 (Ct. Cl. 1977); *cert. denied*, 434 U.S. 1009 (1978). These presumptions or indications notwithstanding, the Congress in its 1980 amendments specifically recognized that the judicial review for agency initiated mental disability cases was

merely expanding an existing *Scroggins* type of judicial review. Congress was clearly cognizant of the judicial interpretations of 5 U.S.C. § 8347(c) and it intended to continue the existing remedy of *Scroggins* type of review, based on its leaving the other portions of the statute intact.

IV. The Court of Appeals for the Federal Circuit has jurisdiction pursuant to 5 U.S.C. § 7703 and 28 U.S.C. § 1295 to review decisions of MSPB relating to disability retirement.

It is clear from the language and history of Chapter 77 of the Civil Service Reform Act that it was intended to govern all matters within the appellate jurisdiction of the MSPB. MSPB, whose interpretation of the statute it administers is entitled to great deference, *Udall* v. *Tallman, supra* took that identical position before the Federal Circuit. Similarly, Judge Smith, writing for four dissenting Federal Circuit judges took a similar position. 718 F.2d at 407, 408.

Section 7701(a) provides:

> An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from *any* action which is appealable to the Board under *any* law, rule or regulation. (Emphasis added)

Similarly, 5 U.S.C. § 7703(a) provides:

> *Any* employee or applicant for employment adversely affected or aggrieved by *a* final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision. (Emphasis added)

OPM's denial of Petitioner's application for disability retirement from his position as a federal employee was an action appealable to the MSPB pursuant to 5 U.S.C. § 8347(d)(2). Petitioner exercised his right to appeal OPM's decision to the MSPB and was adversely affected by the MSPB's decision in this case. Petitioner is thus entitled to review to the Federal Circuit (see 28 U.S.C.

§ 1295(a)(9)), under the unambiguous language of the statute.

The legislative history of these provisions provide that section 205 amending Chapter 77 "makes important changes in the procedures governing review by the Board [MSPB] and the courts of adverse actions, such as removals, and *other appealable actions* taken by an agency." (Emphasis added). S. Rep. No. 95-969, 95th Cong. 2d Sess, 51, *reprinted in* 1978 U.S. Code Cong. and Ad. News at 2773. The legislative history states further that section 7703(a) "applies to judicial review of *all* final orders or decisions of the Board. . ." Id. at 62, *reprinted in* 1978 U.S. Code Cong. and Ad. News at 2784. The administration's Reorganization Plan No. 2 of 1978, 5 U.S.C. § 1101 Note, which accompanied the legislative proposal for civil service reform as part of the legislative package, specifically included retirement cases. By way of this Reorganization Plan, "any action to the Board" would include the appellate adjudicatory responsibilities of the Civil Service Commission in disputes relating to retirement benefits. S. Rep. No. 95-969, 95th Cong. 2d Sess 1-2(1978). The Civil Service Reform Act amended existing statutes conferring appeal rights under 5 U.S.C. § 8347(d) to substitute the MSPB for the Commission. Review of all non-discrimination cases from decisions of the MSPB were conferred by Section 7703 upon the Court of Appeals and the Court of Claims. (Subsequently transferred to the Federal Circuit by the Federal Courts Improvement Act of 1982, 28 U.S.C. § 1295(a)(9)).

Furthermore, as the dissenting opinion written by Judge Smith recognized, Section 7701(a) is the main jurisdictional basis for appealable agency adverse actions—and the jurisdiction of section 7701(a) actions is plenary. *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1317 (Fed. Cir. 1983). Although Section 7701(a) is expressly made the jurisdictional basis for actions under *inter alia*, Sections 4303(e) and 7513(d), other agency actions, such as the withholding of periodic step increases,

under Section 5335(c) have been held to be appealable under section 7701. *Meyer* v. *Department of Health and Human Services*, 666 F.2d 540 (Ct. Cl. 1981). The courts have asserted jurisdiction in other cases, although not specifically provided under Section 7701 or other governing statutes. E.q. Reemployment priority rights—*Raicovich* v. *U.S. Postal Service*, 675 F.2d 417 (D.C. Cir 1982); *Stevens* v. *TVA*, 687 F.2d 158 (6th Cir. 1982); Reduction in force—*Mead* v. *MSPB*, 687 F.2d 285 (9th Cir. 1982); *Horne* v. *MSPB*, 684 F.2d 155 (D.C. Cir. 1982); and disability retirement cases previously recited. The plurality's bare statement that retirement benefit claims are not adverse action claims, 718 F.2d 391 (1983), does not suffice to deny jurisdiction of all other claims under 5 U.S.C. § 7703. The dissent asserts that an analysis of Section 7703 reveals that the Federal Circuit has jurisdiction of all MSPB decisions except discrimination cases and possibly certain Special Counsel and Senior Executive Service Cases.

The dissent remarks that the most significant anomaly in the majority holding is the conflict between their holding of no review and the plenary authority of the Federal Circuit to review, as set out in Section 7703(a)(1). Under the Federal Courts Improvement Act, the entire jurisdiction created by Section 7703 (judicial review of *all* final orders or decisions of the Board) devolved upon the Federal Circuit. H. R. Rep. No. 312 at 18 (jurisdiction . . . over all appeals from the MSPB), S. Rep. No. 275, 97th Cong. 2d Sess. 21, reprinted in 1982 U.S. Code. Cong. and Ad. News 11, 31 ("jurisdiction of *any* appeal from a final order or final decision of the Merit Systems Protection Board). As the dissent urges "there is absolutely no reason to believe—and numerous reasons to doubt—that Congress intended this court to approach its MSPB jurisdiction with the extreme caution practiced by the majority."

This construction by the plurality totally contravenes the presumption in favor of judicial review, *Abbott Laboratories, supra*, and the statutory principle of reconciling statutes where possible. *Morton* v. *Mancuri*, 417 U.S. 535, 551(1974); *Pitzak* v. *OPM, supra*, 710 F.2d at 1479. The plurality's holding totally barring all review in these cases further frustrates the intent of the Civil Service Reform Act and the Federal Courts Improvement Act to have the Federal Circuit hear all appeals from the MSPB.

CONCLUSION

For the aforesaid reasons, the decision of the United States Court of Appeals for the Federal Circuit should be reversed.

Respectfully Submitted,

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